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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re B.B., a Person Coming Under the Juvenile Court Law.	D074428
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. H.A., Defendant and Appellant.	(San Diego County Super. Ct. No. J519539)

APPEAL from an order of the Superior Court of San Diego County, Kimberlee A. Lagotta, Judge. Affirmed.

Paul A. Swiller, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Kristin M. Ojeil, Deputy County Counsel, for Plaintiff and Respondent.

H.A. (Mother) appeals from an order of the juvenile court terminating her parental rights over B.B. pursuant to Welfare and Institutions Code section 366.26.[1] Mother, a member of the Citizen Potawatomi Indian Tribe (the Tribe), claims that the juvenile court violated the federal Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.) and its state equivalent (Welf. & Inst. Code, § 224 et seq.) when it found that Mother's continued custody of B.B. likely would result in serious emotional or physical damage to B.B., both because the court applied an incorrect standard of proof and failed to base its detriment finding on evidence provided by a qualified expert witness. Further, Mother argues that substantial evidence did not support the juvenile court's finding that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and those efforts proved unsuccessful.

We affirm the order of the juvenile court.

I

FACTUAL AND PROCEDURAL BACKGROUND

In June 2017, the San Diego County Health and Human Services Agency (Agency) filed a petition to declare infant B.B. a dependent of the juvenile court. The Agency alleged that B.B.'s parents, Mother and D.B. (Father), abused alcohol and controlled substances, refused substance abuse treatment, declined to take multiple drug tests requested by the Agency, had a lengthy criminal history, left B.B. unsupervised, and

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

engaged in domestic violence in B.B.'s presence. Further, it alleged that Mother's and Father's parental rights over B.B.'s sister had been terminated, Mother had lost custody of three other children she had from another father, and Father had lost custody of three other children he had from another mother. The Agency removed B.B. and placed her in the home of relatives who had adopted B.B.'s sister.

At the detention hearing, the juvenile court concluded that a prima facie showing had been made that B.B. was a person described by section 300, subdivision (b), continued care in the home of Mother and Father was contrary to B.B.'s welfare, and the ICWA applied. Further, it found that reasonable efforts had been made to prevent or eliminate the need for B.B.'s removal from Mother and Father's home and to make it possible for her to return to the home. In particular, the court indicated it had considered the Agency's detention report, which stated that substance abuse treatment, counseling, case management assistance, parent training, and transportation had been offered. Shortly thereafter, the Tribe entered an appearance and informed the court that it agreed with the Agency's placement of B.B. in her relative caregivers' home.

In advance of the contested jurisdiction and disposition hearing, the Agency prepared a jurisdiction/disposition report and two addendum reports in which it indicated that B.B. was thriving in the home of her caregivers, who were willing to adopt her. The Agency further reported that it had offered transportation services to Mother and Father for weekly visitations with B.B., but Mother had attended less than half of the scheduled visits and Father had not visited B.B. for months. The Agency also indicated that Mother and Father had been arrested for probation violations, Father had tested positive for

methamphetamine, and neither parent had completed the drug treatment programs to which the Agency had referred them. Therefore, pursuant to section 361.5, the Agency recommended that no reunification services be ordered.

At the contested jurisdiction and disposition hearing, the Agency submitted its reports into evidence and elicited expert testimony from the Tribe's representative. The Tribe's representative, who had testified as an expert or submitted an expert declaration in over 100 juvenile dependency cases involving American Indian families and/or ICWA-related issues, stated that the Tribe felt "the parents' rights need[ed] to be terminated as to [B.B.], without the benefit of reunification services." She further testified that the Tribe believed that continued custody by Mother and Father likely would result in serious emotional or physical damage to B.B. due to the parents' drug use, criminal history, child welfare history, and failure to utilize the support services they had been offered.

The Agency also elicited testimony from the social worker assigned to B.B.'s case, who stated that B.B. would face a "high" risk of danger if she were returned to Mother's care due to Mother's "lengthy substance abuse history," lack of stable housing or income, emotional volatility, conflicted relationship with Father, failure to reunify with her other children, and lack of progress utilizing the voluntary and reunification services that had been offered to her over time, as well as B.B.'s tender years.[2] In particular, he testified that Mother was offered voluntary services for B.B., including parenting assistance and

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[2] The social worker testified about the risk of danger B.B. would face if she were returned to Father's care as well. Because Father did not appeal the juvenile court's order, we omit discussion of evidence pertaining solely to Father.

support, which Mother did not complete. He testified that Mother also was offered voluntary services for B.B.'s sister, including substance abuse services, counseling, and parenting services, which Mother did not utilize. Further, he testified that Mother was offered reunification services for at least one of her other children but failed to reunify.

The court found the allegations of the petition true by clear and convincing evidence and ordered that no reunification services be offered. Further, it found that the ICWA applied and concluded by clear and convincing evidence, including the testimony of an expert witness, that continued custody of B.B. by Mother and Father likely would result in serious emotional or physical damage to B.B.. It also determined by clear and convincing evidence that active but unsuccessful efforts had been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family. Mother and Father filed notices of intent to seek writ review of the findings and orders. However, appointed counsel for Mother and Father, finding "no arguable meritorious issues," declined to file the writ petitions and the appeals were dismissed.

In anticipation of the permanency planning hearing, the Agency prepared an assessment report and addendum report recommending termination of Mother's and Father's parental rights over B.B. and a permanent plan of adoption. In its reports, the Agency stated that Mother recently had been arrested for possession of a controlled substance, petty theft, and being under the influence, and Father had been arrested for grand theft and probation violations. Further, it stated that Mother had attended only 11 out of 32 scheduled visits with B.B. in the nine months following her removal, including one instance in which Mother was under the influence, and Father had visited B.B. only

three times. The addendum report included letters from B.B.'s caregivers and maternal grandmother recounting Mother's lengthy history of substance abuse and requesting that B.B. remain in the custody of her relative caregivers.

Shortly before the permanency planning hearing, Mother petitioned the court to vacate the hearing and order that B.B. be placed with Mother or, alternatively, order reunification services, pursuant to section 388. In her request, Mother argued and presented evidence suggesting that she had begun psychiatric care, entered a residential substance abuse treatment program, participated in parenting classes, and separated from Father. The Agency prepared an addendum report opposing Mother's request on grounds that her three-month period of sobriety, while laudable, was not material considering her decades-long history of substance abuse, past failures to utilize treatment services, and lack of adequate parenting skills. The Tribe representative also informed the court that, notwithstanding Mother's treatment efforts, the Tribe was "not inclined to champion reunification for her" and "support[ed] termination of parental rights of both parents."

At the permanency planning hearing, however, Mother and Father reversed their positions, withdrew their requests for a contested hearing and Mother's section 388 petition, and submitted on the Agency's recommendations that Mother's and Father's parental rights be terminated. The court asked the Tribe's representative, who appeared at the hearing telephonically, whether she "ha[d] anything to add at [that] time." The Tribe's representative responded that she did not have anything to add, but agreed with the Agency's recommendations. Thereafter, the court received the Agency's assessment and addendum reports into evidence, concluded that B.B. was an Indian child as defined

in the ICWA, found by clear and convincing evidence that active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and those efforts proved unsuccessful, and found by clear and convincing evidence that continued custody of B.B. by Mother and Father was likely to result in serious emotional or physical damage to B.B. The court terminated Mother's and Father's parental rights and referred B.B. for adoptive placement.

Before the hearing ended, the Agency's counsel informed the court that she had expected the hearing to be contested and, had she known Mother and Father were going to submit on the Agency's recommendations, would have obtained a declaration from the ICWA expert to submit into evidence. Therefore, she requested that appointed counsel for Mother and Father stipulate that if the Tribe representative had testified, she would have testified as a qualified expert witness that continued custody of B.B. by either parent would result in serious emotional or physical damage to B.B. Mother's and Father's appointed counsel orally responded that they stipulated to the request.

Mother appeals the order from the permanency planning hearing.

II

DISCUSSION

A. *ICWA Overview*

"Congress enacted ICWA in 1978 in response to 'rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-

Indian homes.' [Citation.] ICWA declared that 'it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . .' " (*In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8.) "Consistent with this policy, ICWA establishes procedural and substantive standards governing the removal of Indian children from their families." (*In re Autumn K.* (2013) 221 Cal.App.4th 674, 702.) " 'In 2006, our state Legislature 'incorporated ICWA's requirements into California statutory law.' " (*In re J.L.* (2017) 10 Cal.App.5th 913, 918.)

The minimum standards established by ICWA and its California equivalent include a requirement that, before a court may remove an Indian child from his or her parent's custody in a child custody proceeding, it must find by clear and convincing evidence, including testimony from a qualified expert witness, that "continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912(e); Welf. & Inst. Code, § 361, subd. (c)(6).) The same likelihood of harm finding must also be proven beyond a reasonable doubt, supported by testimony from a qualified expert witness, before parental rights may be terminated. (25 U.S.C. § 1912(f); Welf. & Inst. Code, § 366.26, subd. (c)(2)(B)(ii).) This finding is known as the detriment finding. (*In re M.B.* (2010) 182 Cal.App.4th 1496, 1502.) The parties may stipulate in writing for a qualified expert witness to provide a declaration or

affidavit to support a detriment finding in lieu of live testimony. (Welf. & Inst. Code, § 224.6, subd. (e).)

In addition, the state and federal ICWA statutes require a court, before it may remove an Indian child from his or her parent's custody or terminate the parents' parental rights, to find by clear and convincing evidence that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." (25 U.S.C. § 1912(d); Welf. & Inst. Code, § 361.7, subd. (a); *Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 997.) The statutes do not define active efforts. (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1286.) However, we have described them as " 'timely and affirmative steps taken to accomplish the goal which Congress has set: to avoid the breakup of Indian families wherever possible by providing services designed to remedy problems which might lead to severance of the parent-child relationship.' " (*In re A.L.* (2015) 243 Cal.App.4th 628, 638; 25 C.F.R. 23.2 ["Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family."].)

B. *Detriment Finding*

Mother contends the juvenile court erred at the permanency planning hearing when it found that Mother's continued custody of B.B. likely would result in serious emotional or physical damage to B.B., given that the court: (1) based its detriment finding on clear and convincing evidence rather than proof beyond a reasonable doubt; and (2) a qualified expert witness did not testify (or submit a declaration or affidavit) regarding the likelihood of harm B.B. would face in Mother's continued custody.

(25 U.S.C. § 1912(f); Welf. & Inst. Code, §§ 224.6, subd. (e); 366.26, subd. (c)(2)(B)(ii).) The Agency concedes these errors and we agree that Mother's claims of error are well-taken.

Nevertheless, the Agency claims we should reject Mother's challenges to the detriment finding because she forfeited and/or waived them by not raising them in the juvenile court and, furthermore, by stipulating that the Tribe's representative would have provided expert testimony supporting the detriment finding had she been called to testify. In support of this argument, the Agency cites *In re Riva M.* (1991) 235 Cal.App.3d 403 (*Riva*), an opinion issued before California codified its own version of ICWA. In that case, which concerned the federal ICWA statute only, the Court of Appeal concluded that a parent of an Indian child in a dependency proceeding had forfeited the same arguments Mother raises here by not asserting them in the juvenile court.[3] (*Id.* at pp. 411-412 ["We can only assume [father] did not care whether the ICWA standards were applied, or was attempting to sandbag the issue for appeal. Neither of those reasons merits our consideration of an issue not raised in the trial court."]; see *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739 fn. 3 ["[F]ailure to object in the juvenile court waives both the right to proof beyond a reasonable doubt and to expert testimony under the [ICWA]."].)

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3 The *Riva* court used the term "waiver" when referring to the parent's failure to raise his argument in the juvenile court. (*Riva*, *supra*, 235 Cal.App.3d. at p. 412.) However, the more appropriate term to describe the conduct at issue is "forfeiture." Forfeiture is the failure to make the timely assertion of a right, while waiver is the intentional relinquishment or abandonment of a known right. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.)

Mother responds that the forfeiture doctrine discussed in *Riva* was "modified" by California Rules of Court, rule 5.484(a)(2), which went into effect on January 1, 2008, after *Riva* was decided. That rule provides that a parent in a child custody proceeding involving an Indian child "may waive the requirement of producing evidence of the likelihood of serious damage" by executing a written stipulation or failing to object, but "only if the court is satisfied that the person . . . has been fully advised of the requirements of the Indian Child Welfare Act and has knowingly, intelligently, and voluntarily waived them." According to Mother, the court did not admonish her regarding the ICWA's requirements, inquire whether she was waiving its requirements, or make any findings regarding waiver. Therefore, Mother claims there was no basis from which to find a knowing, intelligent, and voluntary waiver of the ICWA's requirements.

We do not decide whether Mother knowingly, intelligently, and voluntarily waived the ICWA's requirements because, assuming without deciding that her arguments are preserved, Mother has not established any prejudice arising from the asserted errors. (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1674 ["Only prejudicial error results in reversal of a judgment."].) The test for determining prejudice when a court uses an incorrect standard of proof or fails to require expert testimony when making an ICWA detriment finding is "whether there is a reasonable probability the outcome would have differed in the absence of the procedural irregularity." (*Riva*, *supra*, 235 Cal.App.3d at pp. 412-413; see *In re A.C.* (2015) 239 Cal.App.4th 641, 656.) On this record, there is no reasonable probability that the court's use of the correct standard of proof, or the admission of evidence from a qualified expert witness, would have produced

a different outcome, given the substantial and overwhelming evidence of emotional and physical harm B.B. likely would have experienced in Mother's continued custody.

As the juvenile court stated at the contested jurisdiction and disposition hearing, Mother has engaged in a "constellation of concerning behaviors," including three decades of substance abuse, domestic violence, criminal conduct, and neglectful behavior that have resulted in the termination of her parental rights over B.B.'s sister and prevented her from reunifying with her three other children. Furthermore, the court found that Mother exhibits "emotional volatility" and "unpredictability"—so much so that the court opined that "it's frightening to imagine an infant being raised in that environment." These patterns and practices were documented in the Agency's assessment and addendum reports, which the court received into evidence at the permanency planning hearing. Mother presented no evidence rebutting or disputing these reports at the hearing.

Mother contends it is "possible and not altogether unlikely" that, in the absence of the asserted errors, the juvenile court would not have made the same detriment finding because Mother had begun psychiatric care, entered a substance abuse treatment program, participated in parenting classes, and separated from Father in the three-month period preceding the permanency planning hearing. We are not persuaded.

As the Agency discussed in its final addendum report, Mother's three months of treatment, while commendable, did not significantly ameliorate the extensive risks presented by her three-decade history of substance abuse and neglect. In fact, even in the months preceding the permanency planning hearing, Mother continued to exhibit troubling behaviors. For instance, she was arrested for possession of a controlled

substance, petty theft, and being under the influence. She failed to attend approximately two-thirds of her scheduled visits with B.B. Further, the Tribe representative informed the court shortly before the permanency planning hearing that it was "not inclined to champion reunification" and "support[ed] termination of parental rights of both parents," notwithstanding the initial signs of progress Mother had made.

Given all these facts, it is not reasonably probable that the asserted errors resulted in a different outcome. Accordingly, they provide no grounds for us to reverse.

C. *Active Efforts*

Next, Mother challenges the juvenile court's finding that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and those efforts had proved unsuccessful. As all parties agree, we review the record for substantial evidence to support the juvenile court's active efforts finding. (*In re Michael G.* (1998) 63 Cal.App.4th 700, 708, 715-716; *In re A.C.* (2015) 239 Cal.App.4th 641, 656-657.)[4] On the record before us, we conclude that ample evidence supports the juvenile court's active efforts finding.

The ICWA requires that " 'timely and affirmative steps be taken to accomplish the goal which Congress has set: to avoid the breakup of Indian families *whenever possible*

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4 As discussed in *C.F. v. Superior Court* (2014) 230 Cal.App.4th 227, 240, California courts have been inconsistent in the standards they apply to review active efforts findings and, some courts, relying on Alaska law, have described the review as a "mixed question of law and fact that should be decided independently." We agree with the *C.F.* court that substantial evidence is the more appropriate standard of review for the reasons discussed in that opinion and, consistent with our prior decision in *In re Michael G., supra*, 63 Cal.App.4th at pp. 708, 715-716, adhere to that standard of review here.

by providing services designed to remedy problems which might lead to severance of the parent-child relationship.' " (*In re K.B., supra,* 173 Cal.App.4th at p. 1284.) However, it "does not require the performance of idle acts. [Citation.] And where substantial but unsuccessful efforts have just been made to address a parent's thoroughly entrenched drug problem in a juvenile dependency case involving one child, and the parent has shown no desire to change, duplicating those efforts in a second case involving another child-but the same parent-would be *nothing* but an idle act." (*Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1016.) Thus, evidence of a parent's chronic substance abuse in the recent past, despite repeated intervention efforts, can satisfy the ICWA's active efforts requirement. (*Id.* at p. 1018; *In re K.B., supra*, 173 Cal.App.4th at p. 1287.)

At the permanency planning hearing, the juvenile court admitted into evidence three reports authored by the Agency addressing, among other things, the numerous services that have been provided to Mother in past dependency proceedings.[5] As the Agency explained, Mother received support services in these past proceedings including residential substance abuse treatment, individual and group therapy, parenting classes, and 12-step recovery programs. Despite these intensive support efforts, Mother continually relapsed and succumbed to her addiction, which resulted in the loss of her

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5 Mother contends that "no evidence" of active efforts was presented at the permanency planning hearing. That is inaccurate. Although no witness *testified* at the uncontested permanency planning hearing, the court received the Agency's reports into evidence. (*In re K.B., supra*, 173 Cal.App.4th at p. 1287, fn. 12 ["ICWA does not require that the court's finding that active efforts were made be supported by expert testimony"].) Further, we review the entire record to determine whether substantial evidence supports the active efforts finding. (*In re Michael G., supra*, 63 Cal.App.4th at p. 716.)

parental rights over B.B.'s sister (just four months before the present dependency petition was filed) and prevented her from reunifying with her other children. The lengthy history of services offered to Mother in past proceedings, which she has failed to utilize with any lasting success, constitutes substantial evidence from which the court could have concluded that the ICWA's active efforts requirement was satisfied.

In addition to the services Mother received in connection with past dependency proceedings, the Agency's reports also catalogue an array of services and referrals provided to Mother in *this* dependency proceeding. Prior to the detention hearing, the Agency referred Mother to substance abuse treatment programs, a housing assistance group, domestic violence groups, counseling, and parenting programs, which resulted in little or no meaningful progress. After the detention hearing, the Agency again referred Mother to a substance abuse treatment program, which she did not enter for several weeks (although she later changed her mind). The Agency scheduled a child and family team meeting with the social worker, B.B.'s caregivers, resource parents, and a facilitator, which Mother did not attend. Further, the Agency scheduled, offered transportation, and supervised visits with B.B., yet Mother attended these visits only sporadically and, on one occasion, while under the influence. By any measure, the record supports a finding that Mother received, but did not utilize, tools and resources to stabilize her family.

In response, Mother claims that the court should have given greater weight to her participation in a substance abuse treatment program and parenting classes in the three-month period preceding the permanency planning hearing—in essence, her argument is that the evidence is insufficient to support a finding that the active efforts "have proved

unsuccessful." (25 U.S.C. § 1912(d); Welf. & Inst. Code, § 361.7, subd. (a).) However, as the Agency opined in its reports, the court was justified in finding that the active efforts were unsuccessful considering the duration and severity of Mother's addiction issues and her lack of progress in the first 13 months of the dependency proceeding.

Further, "the test on appeal is not whether substantial evidence supports a finding the appellant wishes the court had made but rather whether substantial evidence, contradicted or not, supports the conclusions the court did make." (*Adoption of A.B.* (2016) 2 Cal.App.5th 912, 925; *IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 646 ["[I]t does not matter that there was evidence that contradicts the version of events set forth above. The evidence presented at trial was solid, reasonable, and credible, and therefore met the legal definition of substantial evidence to support the judgment."].) Mother's argument establishes, at most, the existence of a factual dispute—one that the juvenile court was entitled, as the trier of fact, to resolve in favor of the Agency.

DISPOSITION

The juvenile court's order is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

IRION, J.